IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 25TH SEPTEMBER 2007 / 3RD ASWINA 1929

WP(C).No. 7300 of 2007(R)

PETITIONER:

C.V.UNNIKRISHNAN, AGED 59,
S/O VASUDEVAN, KALAPURAKAL HOUSE,
KADAVANTHRA, COCHIN-20.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENTS:

1. THE HON'BLE OMBUDSMAN FOR LOCAL
SELF GOVERNMENT INSTITUTIONS, THIRUVANANTHAPURAM,
BARTON HILL BUNGLOW, VANCHIYOOR P.O.,
THIRUVANNTHAPURAM-695 037.

2. THE CORPORATION OF COCHIN,
REP. BY ITS SECRETARY, BOAT JETTY,
ERNAKULAM.

3. SRI. LENIN, S/O K.K.KUMARAN,
KALATHIL HOUSE, ELAMKULAM VILLAGE,
COCHIN.

4. THE STATE OF KERALA, REP. BY THE
SECRETARY TO THE GOVERNMENT,
LOCAL SELF GOVERNMENT DEPARTMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

R2 BY ADV. SRI.C.M.SURESH BABU,SC,COCHIN CORPORATION
R3 BY ADV. SRI.K.S.BABU
SMT.N.SUDHA
R4 BY SRI.K.J.MOHAMMED ANZAR, SR. GOVT. PLEADER.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 25/09/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

PIUS C. KURIAKOSE, J.

W.P.(C) No. 7300 OF 2007

Dated this the 25th day of September, 2007

JUDGMENT

In this Writ Petition under Article 226, the petitioner who has constructed a house upon his property on the basis of a building permit issued by the 2nd respondent Corporation of Cochin challenges the procedure adopted and the resultant order passed by the 1st respondent Ombudsman for Local Self Government Institutions proposing to issue directions to the Corporation to initiate proceedings against the petitioner including those for demolition of portions of his house.

2. The petitioner is the owner in possession of 1.600 cents of land in Survey No.670/8 of Elamkulam Village by virtue of Ext.P1 release deed dt.28.06.02. For constructing a house on the property covered by Ext.P1, the petitioner applied to the 2nd respondent Corporation and after following the normal procedural enquiries, Ext.P2 building permit dt.04.01.03 was issued to the petitioner. The petitioner points out that since on the southern side of the property of the petitioner is a pathway which in turn is the northern boundary of the person who uses the pathway, petitioner obtained a consent from that person, the 3rd respondent. Ext.P3 is copy of that consent. Petitioner submits that in all the entire construction is having an approximate area of 400 sq. feet

only and the building is a residential in one. Since the petitioner was not expecting any controversies by carrying out the construction, the same was made by slightly shifting towards the further north. Therefore, in order to avoid disputes with the neighbouring property owner on the northern side, who is a sister of the petitioner where under the open space between the two properties will be reduced from 100 cms to 80cm, the petitioner purchased property of about 30 cms for the width on the northern side of the petitioner's property by Ext.P4 document dt.08.10.03. According to the petitioner, the constructions made by him do not violate any of the rules and much less Rule 62 of the Kerala Municipality Building Rules, 1999. The allegation against the petitioner now levelled is that on one side a minimum 60 cm has not been left. This allegation, according to the petitioner, is actually in correct since there is space of 60 cms between the basement and the boundary wall. It is pointed out that even according to the 3rd respondent his pathway is having only a width of 79.3 cms. So from that point to the basement there is an open space of more than 60 cms. Petitioner also relies on Ext.P3 consent and in the light of Ext.P3, Rule 62 gives the petitioner the liberty to construct building on the basement by not leaving the required 60 cms. It is submitted by the petitioner that the 3rd respondent

objected to the construction only after the same was completed. He filed OP No.14948 of 2003 alleging that the petitioner's building is constructed in violation of the building rules. The Original Petition was decided against the 3rd respondent and Ext.P5 is copy of the judgment in the Original Petition. After Ext.P5 was delivered, the 3rd respondent filed RP No.524 of 2003 seeking a review of Ext.P5 stating that it was on account of mis-representation that Ext.P3 consent was granted. Ext.P6 is copy of the Review Petition. It is pointed out that in Ext.P6 the 3rd respondent does not have a case that Ext.P3 consent was not issued by him and contends that it is clear from Ext.P3 and the RP memorandum itself that the benefit of the proviso to Rule 62 is available to the petitioner. Thereafter, the 2nd respondent Corporation initiated proceedings under Section 406 of the Municipalities Act stating that the constructions effected by the petitioner deviates from the approved plan. Petitioner challenged the proceedings in WP(C) No.19583 of 2003 before this Court. This Court found that no opportunity had been granted to the petitioner and accordingly directed the 2nd respondent to decide the matter afresh. Ext.P7 is copy of the judgment in WP(C) No.19583 of 2003. After reconsideration also the Corporation passed an order directing demolition of the structure put up by the petitioner.

Thereupon the petitioner approached the Tribunal for Local Self Government Institutions by filing an appeal. The Tribunal passed an order setting aside the order of demolition passed by the corporation and directed the Corporation to reconsider the issue including the matter of any possible regularisation of the construction. Ext.P8 is copy of the judgment of the Tribunal. While matters stood so, simultaneously in a parallel proceedings, the 3rd respondent attempted to invoke the jurisdiction of the 1st respondent Ombudsman. Ext.P9 is copy of the complaint submitted by the 3rd respondent before the Ombudsman. According to the petitioner, though it was absolutely irregular on the part of the Ombudsman to have proceeded with the matter since the Tribunal for Local Self Government Institutions was in seisin of the same matter, the 1st respondent entertained Ext.P9 complaint and proceeded to consider the issue in detail. Consequently, the 1st respondent Ombudsman dropped the proceedings in Ext.P9 complaint. But, thereafter the 2nd respondent Corporation re-examined the issue and passed Ext.P10 order. It is pointed out that Ext.P10 order dt.26.05.06 is thus apparently illegal as the order is a non-speaking one and without verifying the records and without affording an opportunity of being heard to the petitioner. Following that a Review Petition was filed by the 3rd

respondent as RP 3 of 2006 that there may be directions in the issue in the light of the re-examination. Pursuant to that RP, the 1st respondent Ombudsman has passed Ext.P11 order. Ext.P11 order purports to have been issued on the basis of a local inspection conducted by the 1st respondent. According to the petitioner no notice was issued to him concerning the alleged local inspection. In Ext.P11 there is a finding that there is no space on the southern side and that no consent had been obtained. Both these findings, it is contended, are wrong. The petitioner contends that Ext.P11 order issued by the Ombudsman is illegal, unsustainable and is outside the jurisdictional competence of the Ombudsman. The order does not stay within the realm of Section 271 of the Panchayat Raj Act. Raising various grounds, the petitioner prays that Exts.P10 and P11 be quashed.

3. A detailed counter affidavit has been filed by the 3rd respondent justifying Exts.P10 and P11. Inter-alia it is contended therein that pathway having a width of 79.0 has been used by the 3rd respondent and his family members for the last more than 20 years. The pathway is situated on the southern side of the property of the petitioner. The eastern and southern boundaries of the 3rd respondent's property including the pathway abuts the property of the petitioner. The petitioner

approached this respondent for getting consent to construct a building abutting the northern side of his property. Therefore, this respondent issued Ext.P3 which states that this respondent has no objection in constructing a residential building by the petitioner abutting northern boundary of his property. But, the petitioner mis-interpreted the matter with ulterior motives before the 2nd respondent and obtained a building permit and approved plan. He constructed the building even deviating from the approved plan and permit. Ext.P2 permit is obtained by the petitioner by misrepresenting the boundaries and the consent obtained from the 3rd respondent. Ext.P3 will show that the 3rd respondent had consented to the construction of a building abutting the northern boundary only. The consent was not given for abutting the southern boundary of the petitioner's property. Along with the above counter affidavit the 3rd respondent has produced copy of the proceedings dt.24.04.03 issued by the 2nd respondent Corporation to the petitioner directing the petitioner to remove the illegal and unauthorised construction. The 3rd respondent has also produced a copy of the judgment of the Division Bench of this Court in OP No.s 9483 and 15401 of 2002 as Ext.R3(b). Ext.R3 (b) is relied on to contend that the 1st respondent Ombudsman has every right to pass orders in the

Corporation area and is having jurisdiction over like issues.

4. Sri.G.Sreekumar(Chelur), learned counsel for the petitioner, Smt.Sudha Babu, learned counsel for the 3rd respondent and Sri.K.J.Mohammed Anzar, learned Government Pleader have addressed me extensively. The submissions were on the basis of the pleadings raised by the parties. My attention was drawn to the various documents placed on record and to statutory provisions particularly to Rule 62(2) of the Kerala Municipality Building Rules.

5. Having considered the rival submissions addressed before me in the light of the documents placed on record and the lie and location of the petitioner's property, visa vis the 3rd respondent's property and the lane belonging to the 3rd respondent, I have no difficulty to construe Ext.P3 as consent given by the 3rd respondent to the petitioner for construction of building on the petitioner's property situated by the northern side of the lane belonging to the 3rd respondent. According to the 3rd respondent and according to the Ombudsman the consent Ext.P3 is in respect of the northern boundary of the 3rd respondent's property. But, it is not disputed before me that on the northern boundary of the 3rd respondent's main plot petitioner does not have any other property upon which he can construct building. The reasonable way to construe

Ext.P3 is to construe the same as a consent given for construction on the petitioner's plot situated by the northern side of the 3rd respondent's lane. Construing Ext.P3 in that way it is seen that the construction put up by the petitioner does not offend Rule 62(2) of the Kerala Municipality Building Rules. Therefore the result of the above discussion is that Exts.P10 and P11 are liable to be quashed. I quash them.

The Writ Petition is allowed as above. But, in the circumstances there will be no order as to costs.

PIUS C. KURIAKOSE, JUDGE

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